53352-9-II

Case No. 53352-II

IN THE COURT OF APPEALS, DIVISION TWO

OF THE STATE OF WASHINGTON

TST, LLC dba OAKS MOBILE AND RV COURT

Petitioner

v.

MANUFACTURED HOUSING DISPUTE RESOLUTION PROGRAM OF THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

Appellant

REPLY BRIEF OF APPELLANT

Submitted By:

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A.. The MHLTA Purpose Does Not Include Prohibiting Properly Noticed Increases of Rent.[1]

Respondent overstates the purpose of the MHLTA by equating it with the policy statement in RCW 59.22. The MHLTA was enacted in 1977. *RCW 59.20.010*, *Holiday Resort Community Ass'n v. Echo Lake Associates, LLC, 134 Wash. App. 210, 225 (2006)* It regulates and determines the legal rights, remedies, and obligations arising from a rental agreement between a mobile home lot tenant and a mobile home park landlord. *Holiday Resort Community Ass'n, supra.* The purpose of the act in creating longer and automatically renewable rental agreements was to provide stable, long-term tenancies for homeowners living in a mobile home park. *Western Plaza, LLC v. Tison, 184 Wash.2d 702, 715 (2015).* While nothing in the Act prevents a landlord and tenant from agreeing to long term rent increase limitations, nothing in the act requires such an agreement. *Id.*

The legislative goal of prevention of displacement is expressed in RCW 59.22 which provides tenant associations a right to purchase the

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[1] Respondent is correct. as identified in the Petition for Review TST filed with the Superior Court, the basis for review includes RCW 59.34.05.570(3)(d) and (e). The standard of review is for error of law. *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Com'n*, 151 Wash. App. 788 (2009).

mobile home park community should an owner elect to sell the same and an avenue to private financing of such purchase. *See* RCW 59.22.010.

> Therefore, it is the intent of the legislature, in order to maintain low-cost housing in mobile home parks to benefit the low income, elderly, poor and infirmed, to encourage and facilitate the conversion of mobile home parks to resident ownership, to protect low-income mobile home park residents from both physical and economic displacement, to obtain a high level of private financing for mobile home park conversions, and to help establish acceptance for resident-owned mobile home parks in the private market. RCW 59.22.010(2).

Respondent's contention that the legislative policy expressed in RCW 59.22 is applicable to the MHLTA is overstated. The policy decision made in adopting RCW 59.22 was to afford the tenants such as the ones at issue here, the option to purchase the mobile home park when it was being offered for sale. A right that none of the tenants at issue here nor the other tenants in the park chose to exercise. It is not a policy ground for preventing rent increases themselves and as with Respondent's irrelevant reference to the percentage of such increase. After all, Respondent at least impliedly concedes that the same rent increase with a different effective date would not have been invalid. Removing the hyperbole, Respondent's only contention is that the problem with the increases are the effective date, something that is not reflective of any

identifiable policy in the MHLTA, or RCW 59.22 for that matter.

B. The Plain Language of RCW 59.20.090(2) Permits Increases of Rent Once the Term of the Rental Agreement has Expired.

Respondent next argues that the plain language of RCW 59.020(20 prohibits increases of rent prior to expiration of the term of a rental agreement. RCW 59.20.090(2) is a limitation on a landlord's right to increase rent as recognized in *McGahuey v. Hwang*, but that Court did not hold that the limitation included that a rent increase cold only occur on the date a term begins. However, *McGahuey v. Hwang* does not support Respondent's contention that rent may only be increased if the increase is made on the date of the new term and written notice is give 90 days prior to expiration of the term. That issue was not before the Court. The issue in *McGahuey* was whether a landlord could change a term in the rental agreement regarding responsibility for utility payments. In that instance, the Court found that nothing in RWC 59.20 that prevented a landlord from changing a rental agreement and requiring a tenant to pay for utilities, so long as the landlord charged nothing more than the actual cost of the utility. *McGahuey v. Wang*, 104 Wash. App. 176 (2017, Division 1). The same is true here, but only because the issue is limited to RCW 59.20.090(2). It is RCW 59.20.060(2)c that limits the frequency of rent

increases.

Respondent argues that Appellant's interpretation of RCW 59.20.090(2) would render the "first condition" of RCW 59.20.090(2) superfluous or meaningless. But Court's do not interpret a party's analysis of the "conditions" a statute provides. Courts interpret the language used by the legislature in their efforts to avoid rending a part of the statute itself superfluous or meaningless. *Allen v. Dan and Bill's RV Park*, 6 Wn. App. 2d 349 (2018). A plain reading of the statue reflects that use of the word "upon" does not describe the effective date of a rent increase or even the number of days prior to renewal that a notice of such increase must be given. Under Appellant's interpretation, "upon" is used to describe the event that must occur prior to the landlord's proposed rent increase. The provision or language used is not rendered meaningless or superfluous at all. It has a perfectly reasonable and supportable meaning, that meaning is just not a limitation on the effective date of a rent increase.

The "condition" that Respondent seeks to read into RCW 59.20.090(2) does not actually exist in RCW 59.20.090(2), nor is it something that the Court should entertain as its job in interpreting the statute. Courts do not and should not read statutory language as

"conditions" (at least absent some clear statutory direction that such a condition is intended). Interpreting statutory language as a "condition" in order to facilitate a party's desired outcome undermines the neutrality of the Court in its role of arbiter of disputes and would make the Court nothing more than a supporter of the political aims of one of the parties before it. *Frias v. Asset Foreclosure Services*, 181 Wash. 412, 421 (2014) (Court's role in interpreting a statute is discerning what the law is, not what it should be.) Respondent's argument amounts to a request that the Court not declare what it is in terms, but what Respondent believes the law should be. A request the Court should decline.

Even if this first "condition" that Respondent argues to exist is supportable, Respondent fails to identify how the existence of the first condition would not render a part of the second clause of the second condition meaningless nor a substantial portion of RCW 59.20.060 (discussed later). That is, if the first condition of RCW 59.20.090(2) is that rent increases may only be effective on expiration of the rental agreement, then use of the words "effective date" is meaningless because their could be only one effective date. As explained in the opening brief, when the legislature desires to limit the dates upon which a rent increase

may be effective, it knows how to do it. The legislature did it in RCW 59.18 and also in RCW 59.20.060.

Lastly, nothing in Appellant's argument is counter to the legislative goal of stability and security. In context, Respondent's brief even identifies the limits of such stability. The stability is that once their rental agreement expires, a tenant is on notice that their rent may only be increased if they receive written notice at least 90 days prior to whatever effective date the landlord chooses for such increase. The legislative goals related to the frequency of rent increases and timing in relation to expiration of the rental agreement are actually found in RCW 59.20.060.

C. MHLTA Permits Increases on 90 days Written Notice under RCW 59.20.090(2).

1. RCW 59.20.090(2) Expressly Permits Increases after the Expired Term of a Rental Agreement.

Respondent again misconstrues the argument. It is not the expiration of the original term of the Tenant's rental agreement that necessarily matters. It is the expiration the original term of any of the successive terms. The expiration of any of the prior terms permitted TST to increase the rent under the plain meaning of RCW 59.20.090(2). Nothing in RCW 59.20.090(2) **eliminates** the right to increase the rent

upon expiration of a rental agreement term unless written notice is given 90 days in advance thereof. The limitation that exists under RCW 59.20..090(2) to the landlord's right to increase rent upon occurrence of that event (expiration of a rental agreement term), is that the landlord must give written notice not less than 90 days before the effective date chosen.

2. Western Plaza Does Not Undermine TST's Argument.

Like *McGahuey,* nothing in *Western Plaza* limited the right of a landlord to provide notice of rent increase effective before the end of the current term of a rental agreement. Both cases quote RCW 59.20.090(2) but do not neither held that a rent increase can only occur on the expiration (or more particularly renewal) date of the rental agreement. Unlike *McGahuey*, though, the Court in *Western Plaza* was confronted factually with a rent increase that occurred during one the annual terms of the tenant's yearly rental agreement. *See Western Plaza v. Tison, supra* (Tison originally signed a form rental agreement in October 2001 that was for a one year term).

Appellant addresses *Western Plaza* to illustrate that the plain meaning of the statute is not what Respondent contends. *Western Plaza* went through a trial and two rounds of appeal outlining the facts of the

increases, but everyone failed to recognize that one of the rent increase notice was ineffective of its face? An unlikely proposition and one that countenances against Respondent's claim that a plain reading of the language of RCW 59.20.090(2) only prohibits interim rent increases for rental agreements that are at least a year in length.

3. RCW 59.20.060(2) would only conflict with RCW 59.20.090(2) if the Court upholds the Agency's Interpretation of RCW 59.20.090(2).

If, as Respondent suggests, a landlord may not increase a tenant's rent during the term of their rental agreement because such increases (other than scheduled increases RCW 59.20.060(2) is meaningless. Respondent's argument that both the ALJ did not find RCW 59.20.060(2) did not relate. No language in RCW 59.20.090(2) dictates how often, once a rental agreement has expired, a landlord may increase the rent. But, contrary to the ruling by the ALJ, that does not mean a landlord is free to increase the rental agreement monthly after expiation of a rental agreement. The control on frequency is found in RCW 59.20.060(2). That was the straw man that the ALJ argued must be prevented by making the expiration of the rental agreement the only effective date upon which rent may be increased. The limitation is that interim rent increases are

prohibited for rental agreements of less than one year (now two years) and, if the rental agreement is one year or more, annually. If not prohibited, such rent increases are permitted. Importantly, if RCW 59.20.090(2) is not limited to year-to-year rental agreements. The provision applies to all rental agreements and specifically, what is prevented in RCW 59.20.060(c)(I) and (ii) are only interim increases when the tenancy is for less than one year. If RCW 59.20.090(2) is read to prohibit rental increases during the term, RCW 59.20.060((c)(ii) is not viable. Nothing in RCW 59.20.060(c)(ii) requires a provision to increase rent during the term of a rental agreement in a specified formula or in a specified amount. That type of provision is permitted, but so are other provisions that have the same effect such as 'during the term of this agreement landlord may raise the rent by giving 90 days written notice.' If RCW 59.20.090(2) is interpreted to prohibit interim rent increases period, then the first clause of RCW 59.20.060(c)((ii) is unnecessary because it is the last clause protects scheduled rent increases.

Respondent then argues, that Appellant's interpretation does not achieve the legislative goal of protecting vulnerable tenants and providing stable, long term tenancies. Respondent ignores that neither does their

interpretation because the only difference between the interpretations is when the legally permissible increase of rent may take place. Appellant argues it is any time after a rental agreement has expired, provided it is done with 90 days written notice and no more frequently than 90 days. Respondent argues that such increase can only occur on an anniversary date and if written notice is not given 90 days in advance of that date, rent may not be raised again. A position not supported by the text of the statute.

D. TST Did not Violate the MHLTA by Increasing Rent with 90 Days Written Notice After Expiration of the Term of a Rental Agreement.

1. No Implied Rental Agreement Created When One Already Existed.

Respondent concedes that the purchaser of a mobile home park are subject to the rental agreement between the prior owner and the tenants. This includes oral rental agreements. As noted in *Gillete*, when a landlord permits a tenant to occupy a mobile home space without a written rental agreement, an implied rental agreement exists that begins on the date of occupancy. *Gillette v. Zakarison, 68 Wn. App. 838, 842 (1993)*. That rental agreement was renewable annually with an anniversary date of the date of occupancy. RCW 59.20.050. TST was subject to the implied

agreement. *Western Plaza, supra at 713.* Respondent provides no legal support for the contention that, by accepting rent that TST was obligated to accept created a new rental agreement with an anniversary date of the date that TST purchased the park. Respondent provides no legal support for this contention and ignores the fact that TST could not refuse the rent from the tenants, they were subject to the pre-existing implied agreements. *See generally*, RCW 59.20.050, *Gillette v. Zakarison, supra.*, *Western Plaza, supra.*

The ALJ did not decide whether the evidence supported the attorney generals finding in this regard because the attorney general's finding required a landlord to first determine the date that an implied rental agreement began prior to exercising any right to increase the rent and despite the fact that the term of such rental agreement had expired. AR-559. Rather, the ALJ erroneously concluded that a new implied rental agreement was formed when TST purchased the park. That ruling contradicts *Western Plaza.* A party cannot both be subject to the pre-existing rental agreement and enter into a new agreement and *Western Plaza* clearly held that a landlord that purchases a mobile home park is subject to the pre-existing rental agreement. *Western Plaza, supra.*

While the rental agreement in Western Plaza was in writing, it was not signed by the new owners. It was a one year rental agreement signed by the prior owner that renewed each year thereafter. Id. at 702. Not only was that determination and error of law, but it did not support the attorney general's finding that a landlord must divine the start date of an oral rental agreement prior to issuing notice of rent increase. Because the determination went beyond finding whether the evidence supported the attorney general's finding, it cannot be a basis for affirming the notice of violation. *Narrows Real Estate, Inc. v. MHDRP Consumer Protection Division*, 177 Wn. 2d 80 (2013).

2. Respondent's Argument Ignores Their Own Finding that the 2018 Rental Agreements were Acceptable for those Tenants Who Had Not Previously Signed Rental Agreements.

Respondent argues int its response brief that the 2018 rental agreements signed by all of the tenants improperly raised the tenants rent because they were signed prior to the "expiration of the term of the Tenants' rental agreement." Response Brief,, pg. 28. However, the Notice of Violation made no finding that the 2018 rental agreements with Gosney, Stickley and Simoni violated RCW 59.20.090 despite the fact that those rental agreements changed the amount of rent "midterm." AR 20.

MHDRP had all rental agreement of the tenants and all of the complaints were filed after January 2018. *See generally* AR 1-22. While finding no violation for the tenants' with implied rental agreements, MHDRP did find a violation for Lane because he had a written rental agreement. AR-20.

Respondent now seems to take issue with their own notice and argues, that the 2018 rental agreements with Gosney, Stickley and Simoni also violate RCW 59.20.090(2). Appellant has no need to justify the rental agreements because MHDRP took no issue with them nor did MHDRP identify that corrective action included reimbursement of rent paid by Gosney, Stickley and Simoni after 2018 despite demanding disgorgement of the same rent paid by Lane. AR 21 (identifying the months overpaid by Gosney, Stickley and Simoni as December 2016-December 2017, but December 2016 through August 2018 for Lane).

As detailed by Appellant, because each rent increase for each effected tenant occurred not less than one year after the previous rent increase and with at least 90 days written notice, the increase notices did not violate RCW 59.20.090(2). They were increases for which the landlord was entitled because the rental agreement for the prior year had expired, the rent had not been increased for more than a year (otherwise it

is barred by RCW 59.20.060(c)(ii)) and proper advance notice was given.[2]

3. Nothing in RCW 59.20.090(2) requires that the notice specify an effective date if an increase can only be effective on expiration of the term.

If the Court were to find that the only possible date that the rent could be increased for the tenants is the expiation of their annual term, then each were given notice 90 days in advance of their next expiration date and the rent increases are effective on those anniversary dates. Respondent's argument that Appellant cannot increase rents on the notices that identified effective dates of December 1, 2016, December 1, 2017 and January 1, 2018 prospectively to an unidentified date in the future ignores their entire argument about the requirements of RCW 59.20.090(2). There is no unidentified date in the future, that date is the expiration of the tenant's then current rental agreement. RCW 59.20.090(2) requires 90 days notice in advance of a rental increase, it does not require that the

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[2]The ALJ also identified the need for tenants to be able to move if they did not like the rent increase, but this too is a straw man. Again, the legislature could have drafted RCW 59.20.090 similar to RCW 59.18.140 by providing a landlord may change the rent at the expiration of the term by giving 90 days written notice of the change. Nothing in RCW 59.20.090(2) prevents a landlord from giving notice of the increase 10 days prior to the expiration of the rental agreement and having the effective date be 80 days after expiration. A tenant that would be faced with the same dilemma identified in 5.44. AR 557.

notice itself specify an effective date. Specifying an effective date and interpreting the statue as requiring such makes sense if the effective date can be any date selected by the landlord as long as it meets the notice timeline. If however, the effective date can be only the expiration of the tenant's rental agreements then the tenants were on notice that their rent would increase on expiration of their rental agreements rather than some unidentified date in the future. *Chandler v. Miller,* 152 Wash. 172 (1933) (A person is presumed to know the law of the jurisdiction in which he lives. Such law is not a fact which one may or may not know or understand; such knowledge and understanding must be presumed.).

much interest in receiving a notice as a mobile home tenant. If the law is as the ALJ expressed, that a landlord must give notice at least 90 days prior to the expiration of their then current rental agreement, each one of the tenants was given notice of TST's intention to raise the rent 90 days prior to expiration of their rental agreement. RCW 59.20.090(2) does not dictate the content of the notice.

Respondent urges the Court to ignore interpretation of the notice a residential tenant may be entitled to for a residential tenant when interpreting the MHLTA because the statutes are dissimilar. While the

statutes are not the same and the RLTA does not address the needs of mobile home tenancies, both tenants have an interest in the notices they receive. It is the similarity of the statute's at issue in this instance, not whether the overall statutory scheme of the RLTA and MHLTA that is the operative issue in determining whether interpretations of other similar statutes should be considered. *See* Lowy v. Peacehealth 159 Wash. App. 715 (2011, Div. 1). Residential tenants have a like interest in the notice they receive changing terms of their rental agreement. Having received notice that their rent was increasing and each one of the tenants at issue here staying beyond the expiration of their then current rental agreements, they are in no different position than the tenant in *Housing Resource Group.* Housing Resource Group v. Price, *92 Wash. App. 394 (1998).* To the extent that the Court finds that rent increases under the MHLTA can only occur upon the expiration of a term, each one of the tenants were given notice that the rent was going up well over 90 days prior to the expiration of the yearly rental agreement they had and remained in occupancy after that date and the Court should reverse the violation and corrective action requiring disgorgement of the additional rent after May 31 (Gosney, Stickley and Simoni) and June 30 (Lane) of the years

following notice of the rent increase.

E. RCW 59.20.060(2)(c) is not limited to escalation clauses.

"Furthermore, RCW 59.20.060, which sets out the required and prohibited provisions in MHLTA leases, specifically discusses rent increases and does not prohibit rent cap limitations like the one in Tison's lease" *Western Plaza* at 708. The statute is not directed solely to fixed escalation clauses, it addresses rent increases in general.

TST did not misinterpret the ALJ's ruling because RCW 59.20.060(2)(c) does not only concern rent escalation clauses. That is why the prohibitions outlined in RCW 59.20.060(2)(c) are important in analyzing the requirements of RCW 59.20.090(2). By ignoring that the first two clause of RCW 59.20.060(2)(c) apply to any rent increase, not just rent escalation clauses the ALJ found the statute irrelevant. RCW 59.20.060(2)(c)(i) prohibits rental agreements that include any provision that permits any rent increases during the term, but only if the term is less than one year. Thus, a rental agreement that permits rent increases during the term is allowable under that provision as long as the term of the agreement is one year or greater. That is the when, and it is dependent on the length of the parties agreement. RCW 59.20.060(2)(c)(ii) addresses

frequency and provides that increases may occur no more frequently than annually, but only if the term of the rental agreement is one year or more. Like the ALJ, Respondent misinterprets RCW 59.20.060(2)(c)(ii) as only applying to fixed rent escalation clauses to justify ignoring the statute when interpreting the requirements of RCW 59.20.090(2).

The erroneous restriction applied to the scope of RCW 59.20.060(c)(ii) is clear in finding 5.40. The ALJ specifically found that if RCW 59.20.090(2) were interpreted as TST advocated it would "allow a landlord to increase rent each and every month, even during the term of a written one-year rental agreement, if it liked, so long as it provided three months' notice of the increase." AR 559. A result neither advocated by TST nor possible under the MHLTA. It is not possible, because RCW 59.20.060(2)(c)(ii) expressly prohibits any rental agreement provision that allows a landlord to raise the rent more than annually. Something that could be missed if RCW 59.20.060(2) were only applicable to fixed or formula based rent escalation clauses.

In short, all of the dangers expressed by MHDRP and the ALJ that could occur if RCW 59.20.090(2) is not interpreted to limit a landlord's right to increase rent if the increase is effective on renewal are expressly

prohibited by RCW 59.20.060(2)(c)(i)-(ii). By reading the statutes in harmony, the dangers or conclusions are not possible and such reading also makes clear that RCW 59.20.090(2) provides no limit on the when because that is established by RCW 59.20.060(2)(c)(I) with limits on frequency of such increases established by RCW 59.20.060(2)(c)(ii).

F. TST is Entitled to Fees, Briefs are Limited to Argument and TST is not Required to Predict an Affirmative Defense.

Rap 18.1(B) requires a party seeking fees to devote a section of its brief to its entitlement to fees. Entitlement to fees under RCW 4.84.350 is based on prevailing on a significant issue on review. RCW 4.84.350(1). *Gerow v. Washington State Gambling Comms'n, 181 Wash. 2d. 229 (2014).* In this matter there is only one issue on review, that is whether RCW 59.20.090(2) limits a landlords right to increase rent to only the date the rental agreement expires. TST identified the statutory authority for an award of attorney fees and that its entitlement to attorney fees is based on prevailing on appeal. That is sufficient argument to permit an award of attorney fees should TST be entitled to the relief it has sought. There are not multiple issues involved in this matter for which argument would be required to identify the varying circumstances under which it may be entitled to attorney fees should it prevail on some but not all of the issues

raised. While the entitlement to attorney fees under RCW 4.84.350 includes a consideration of financial resources, financial resources are not part of the argument, rather TST is required to serve and file a financial affidavit not less than 10 days before argument or the matter is to be addressed on the merits. ORAP 18.1c. Only if a motion on the merits been filed is the financial affidavit required to be submitted with the motion or response, as the case may be. ORAP 18.1(c).

Whether the agency decision is substantially justified or in award would be unjust are exceptions to entitlement to attorney and it is up to Respondent to raise either substantial justification or how an award would be unjust. It should not be up to TST to guess what if any grounds, Respondent will argue a defense to entitlement to attorney fees. Here, Respondent only argues that if TST prevails, it should not be entitled to an award because MHDRP's decision was substantially justified. It is the Respondent's burden to prove substantial justification. *Constr. Indus. Training Council v. Washington State Apprenticeship & Training Council of Dept. Of Labor & Industries,* 96 Wash. App. 59, 68 (1999). Substantially justified requires that a reasonable person be convinced the action was justified, not correct, but reasonable. *Raven v. Dept. of Soc. &*

Health Services, 177 Wn. 2d 686, 892 (2007). In support of its contention that MHDRP's decision was substantially justified, Respondent points to the plain language of RCW 59.20.090(2) and that the ALJ agreed. That is insufficient to show substantial justification in this matter. As detailed in its brief and above, the ALJ relied on a restricted reading of RCW 59.20.060(2)(c)(i)-(ii) to ignore the limitations imposed by that statue as a limitation on the dangers the ALJ found would be prevented by invalidating TST's notices. Further, the ALJ did not find as MHDRP did, that a landlord must seek out and discover (or guess) a rental agreements renewal date before increasing rent on a mobile home park tenant. The ALJ recognized the impossible position such a legal requirement could put a landlord in. What if no one knows or can remember? A landlord would be prohibited from ever raising the rent on such a tenant. Instead, the ALJ invented a new rental agreement that was implied when TST purchased the Park so that a renewal date could be established and to which TST was required to time the effective date of its increase. As detailed in the opening brief above, there is no law supporting the contention and it runs counter to the holding in *Western Plaza* that TST's purchase of the park was subject to the pre-existing

implied rental agreement with the owner. Beyond the shifting rationale used by the ALJ to support MHDRP's notice of violation, the plain language of RCW 59.20.090(2) clearly does not provide a particular effective date of a landlord's rent increase. A reasonable person cannot look at the plain language of RCW 59.20.090(2, the unreasoned justification for not considering a related statute that addresses rent increases and the shifting renewal dates used by the ALJ and conclude that the agency decision in this matter was substantially justified. Attorney fees should be awarded to TST.

Respectfully Submitted January 13, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2020, I served a true copy of the foregoing Petitioner's Reply Brief on the parties listed below at their last known address by first class mail:

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CERTIFICATE OF FILING

I certify that on January 13, 2020 I filed an original and one copy of Appellant's Reply - Brief with the WA Court of Appeals, Division Two. By first class mail postage prepaid.

January 13, 2020
/s/Mark G. Passannante
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